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IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM T. WATSON,

Petitioner,

v.

THE M. W. KELLOGG COMPANY,

Respondent.

On Petition for Writ of Certiorari

Brief in Opposition

Douglas P. Rucker, Jr.,
Counsel of Record
Frank B. Miller, III
M. Pierce Rucker, II
SANDS, ANDERSON, MARKS & MILLER
Post Office Box 1998
Richmond, Virginia 23216
(804) 648-1636

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

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Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Douglas P. Rucker, Jr.,
Counsel of Record
Frank B. Miller, III
M. Pierce Rucker, II
SANDS, ANDERSON, MARKS & MILLER
629 East Main Street
Post Office Box 1998
Richmond, Virginia 23216

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STATEMENT OF THE CASE

William T. Watson, a citizen of Virginia, was an employee of Allied Chemical Company (Allied) at its plants in Hopewell, Virginia. Beginning in March of 1967, Watson was assigned to Allied's ammonia plant. He was injured in an ammonia spill in that plant on November 20, 1979.

On August 19, 1981, Watson filed an action at law against The M. W. Kellogg Company (Kellogg) seeking money damages for the injuries suffered as a result of the spill. Kellogg petitioned the United States District Court for the Eastern District of Virginia for removal of the cause, involving the court's diversity jurisdiction.

The essence of Watson's allegation was that Kellogg negligently designed and built the ammonia plant and that Kellogg failed to warn Watson of dangers inherent in the plant. Kellogg denied those allegations and raised the affirmative defense of the statutes of limitation, specifically Va. Code Ann. § 8.-24.2 (1964). That statute provides that no action against the designer or builder of an improvement to real property may be brought more than five years after completion of his services.

At trial, Watson's evidence showed that Kellogg designed and built the ammonia plant pursuant to a contract with Allied dated March 5, 1965. Kellogg began work on that day

and continued construction until May 3, 1967, when it turned over the last part of the plant to Allied's control. Allied accepted the plant on October 26, 1967. Kellogg's last employee left the site on November 4, 1967.

In the trial court and the court of appeals, the parties disagreed over which version of Section 8-24.2 applied to this case. The statute was enacted in 1964 in the form set out in the Addendum. On March 13, 1973, Virginia's General Assembly amended the statute to specifically exclude "the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property" from the benefit

of the five year limitation. See Va. Code Ann. § 8.01-250 (1973).[1] Watson argued below that the amended version applied to the case and that Kellogg was denied the statute's protection by the language added through amendment. Kellogg contended that the original version applied because Kellogg's rights under the statute had vested by the time of the amendment and, therefore, could not be abrogated by the legislature. The trial court and the court of appeals agreed with Kellogg and based their decisions in

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[1]Watson's Petition refers to the statute in question by the designation of its successor, Section 8.01-250. This is misleading because the original version of the statute, which applies here, was always designated "Section 8-24.2."

Kellogg's favor on the original version of the statute. Watson has abandoned that argument and does not challenge the lower courts' rulings that the original version of the statute applies and bars his action. The sole question before this Court is whether the statute violates the United States Constitution.

SUMMARY OF ARGUMENT

There is no special or important reason for this Court to entertain Watson's arguments.

I. They exclusively concern an enactment which was amended over ten years ago and which is practically impotent due to the passage of time.

II. There is no real conflict among the states on the constitutionality of statutes of repose. The different results reached in various tribunals are due to differences in statutory language and the impact of unique provisions in state constitutions.

III. The Petition raises no federal question. Watson concludes but does not argue that the statute is unconstitutional. He complains of unfairness and harshness, matters for the legislature's consideration.

ARGUMENT

I. The Court Should Deny Watson's Petition Because It Involves a Statute Which Has Been Amended.

As explained in the Statement of the Case, Watson's Petition purports to question the constitutionality of Va. Code Ann. § 8-24.2 (1964) as it existed prior to its amendment in 1973. The 1973 amendment substantially altered the statute by excepting materialmen and suppliers from the class of those benefited by the five year limitation.

The fact of the statute's amendment was irrelevant to the outcome of the controversy between Kellogg and Watson. Its impact on questions of this statute's con-

stitutionality is uncertain. Its importance on the immediate issue of certiorari is, however, significant. Section 8-24.2 has not been part of Virginia's Code for over ten years. It protects only the designers, builders, materialmen and suppliers involved in older construction who completed their services before 1968 and whose rights under the original version were vested and irrevocable. See Hupman v. Cook, 640 F.2d 497 (4th Cir. 1981). As Watson admits, Section 8-24.2 is rapidly dwindling in importance as the years accumulate. According to his own statistics, far less than 3% of new litigation will concern the negligence of those designers and builders covered in the

statute in question. Petition at 39. Therefore, over 97% of the cases which could be affected by a decision by this Court will involve Section 8.01-250, the amended version which is a totally different statute. As a practical matter, questions of Section 8-24.2's constitutional vigor are virtually moot. No important federal question has been decided by the court of appeals[2] and none is presented for review by this Court. See Sup. Ct. R. 17(1)(c).

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[2]The fact that the opinion of the court of appeals was unpublished lends credence to the view that the issues presented are of little significance beyond the litigants. See 4th Cir. R. 18(a).

II. The Court Should Deny Watson's Petition Because There is No Real Conflict Among the Circuits

Watson suggests that this Court could resolve a conflict among the states and circuits by addressing the issues presented in his Petition. Urging the Court to seize this opportunity, he lists the opinions of several courts which have stricken statutes of repose in other states. Those opinions, he says, show disagreement.

His conclusion is as superficial as his analysis. The statutes before this Court and those other state and federal courts have nothing more in common than their generic classification of "statutes

of repose". They differ in their wording, in the classifications which they make and in other crucial respects. For example, Hawaii's statute of repose, stricken in Fujioka v. Kam, 55 Haw. 7, 514 P.2d 569 (1973), specifically referred to registered and licensed professionals in classifying protected persons. Section 8-24.1 does not. Furthermore, many of the cases to which Watson refers were decided on state constitutional grounds. The Alabama Supreme Court's decision striking a statute of repose in Lankford v. Sullivan, Long & Hagerty, 416 So.2d 996, 999 (Ala. 1982), rested on the Alabama Constitution's specific guarantee of a remedy for any injury. The court

of appeal's decision in this case is certainly not in conflict with Lankford; Virginia's constitution has no comparable provision. Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975), and Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967), Watson's main cases, were also decided on state constitutional grounds and do not conflict with the decision of the court of appeals.

Watson's claim of conflict in the cases in fallacious; it ignores the many distinctions between them. Any illusory discord is the consequence of differences in statutory language and constitutional provisions and it cannot be harmonized by this Court.

III. The Court Should Deny Watson's Petition Because it Attacks the Fairness of the Statute, Not its Constitutionality.

Although Watson characterizes this as a federal question, it is really a matter of civil procedure which falls squarely into the bailiwick of the states. "A state may set the terms on which it will permit litigation in its courts...." Cohen v. Beneficial Ind'l Loan Corp., 331 U.S. 541 (1949). Watson does not actually challenge the constitutionality of Section 8-24.2. Watson's Petition does not amplify the reasons for his naked assertion that the statute is unconstitutional, as required by

Rule 21(i)(j) of the Rules of the Supreme Court of the United States. He does not say how the lower courts erred. He refers to clauses and cases but his true grievance and only argument is that, in his view, the statue is unwise and harsh. The wisdom of legislation is not subject to judicial review. "This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with or in contravention of the provisions of the constitution." United States v. Butler, 297 U.S. 1, 63 (1935). The harshness of legislation "is not a concern of the courts." St. Louis Iron Mt. & So.

Rwy. Co. v. Taylor, 210 U.S. 281, 295 (1908). Nor is fairness an issue. Fairness is a factor for the legislature, not this Court, to consider in its deliberations.

This Court should decline Watson's invitation to supplant the Virginia legislature. As evidenced by the lack of any constitutional arguments in his brief, Watson's real concern is the statute's impact on him, not its constitutionality. While there may be an issue of legislative wisdom and policy here, there is no federal question and Watson's Petition should be denied.

CONCLUSION

Watson's Petition presents no important federal question or conflict. There is no special reason for this Court to review the decisions of the court of appeals and the district court. This Court should deny Watson's Petition.

Respectfully submitted,

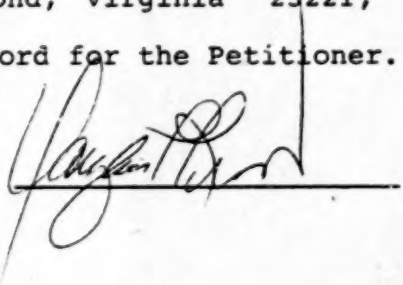
THE M.W. KELLOGG COMPANY

By Counsel

Douglas P. Rucker, Jr.
Frank B. Miller, III
M. Pierce Rucker, II
SANDS, ANDERSON, MARKS & MILLER
629 East Main Street
Post Office Box 1998
Richmond, Virginia 23216

CERTIFICATE

I hereby certify that three true copies of the foregoing Brief in Opposition was mailed, postage fully prepaid, this 4th day of January, 1984, to William G. Shields, Anderson Parkerson & Shields, 3437 West Cary Street, Richmond, Virginia 23221, counsel of record for the Petitioner.



ADDENDUM

Va. Code Ann. § 8-24.2 (1964) Certain actions for damages arising out of defective or unsafe condition of improvements to real property.-No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of said injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property more than five years after the performance or furnishing of such services and construction. This limitation shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.